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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

Number 11, Original

STATE OF MISSISSIPPI,
Plaintiff

*versus*

STATE OF LOUISIANA,
Defendant

## Exceptions of the State of Louisiana to the Report of the Special Master Filed March 14, 1955, and Motion for Leave to File Brief and to Present Oral Argument

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Franklin Press, Inc. Baton Rouge, La.

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## Exceptions of the State of Louisiana to the Report of the Special Master Filed March 14, 1955

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*To the Honorable Supreme Court of the United States of America:*

The State of Louisiana, defendant, pursuant to the order of this Court, herewith submits its exceptions to the report of the Special Master, D. K. McKamy, filed in this case on March 14, 1955, in the following particulars, to-wit:

1.

Defendant excepts to the finding of Fact No. 3 as to Diamond Island, and moves to amend the same by changing the last sentence thereof to read, viz:

"This channel continued to be a running stream, other than at some low water stages of the river, as late as 1878-80, the date set forth on Mississippi River Commission Chart, published in 1883 (Exhibit Fisk—Cross-Examination No. 4, R. 328), and which chart (Plate I of the brief) clearly reveals this channel to be a running stream."

**2.**

Defendant excepts to the finding of Fact No. 4 as to Diamond Island, and moves to amend the same so that it will read, viz:

"The hydrographic survey of the Mississippi River of the published date of 1882, but based on 1878-80 survey (Complainant's Exhibit No. 9, R. 110), is based on the same data of 1878-80 as Mississippi River Commission Chart published in 1883 (Exhibit Fisk Cross-Examination No. 4, R. 328)—Plate I of the brief—which shows the channel around Diamond Island to be a running stream at a low water stage of the river."

**3.**

Defendant excepts to the finding of Fact No. 5 as to Diamond Island, and moves to amend the same so that it will read, viz:

"The flow of the River was divided when the chute channel was formed and one branch of the channel continued around the island until that channel was abandoned. The other branch of the channel was into the chute cut-off and became the sole channel of the River when the old channel was abandoned. The division of the flow was caused by the island. The boundary in the old channel around Diamond Island should be fixed in the

last channel, which was surveyed on the ground and shown in Louisiana Exhibit No. 36 (R. 1325), and the point shown thereon as the head of the final thalweg of that old channel should be the upstream end of the boundary, the point where the boundary between the states in the old channel commences."

**4.**

Defendant excepts to the finding of Fact No. 6 as to Diamond Island, and moves to substitute in lieu thereof the following, viz:

"When the old channel around Diamond Island became fixed in the last channel, which was surveyed on the ground and shown in Louisiana Exhibit No. 36 (R. 1325), all of the accretions formed to the right bank, Bedford Bar, upstream from the point shown on said exhibit as the head of the final thalweg of the old channel, are Louisiana accretions inasmuch as the bed and channel in front of this right bank were changed by the natural and gradual processes known as erosion and accretion, and the boundary that was in such bed and channel followed the varying course of the river."

**5.**

Defendant excepts to the finding of Fact No. 7 as to Diamond Island, and moves to substitute in lieu thereof the following, viz:

"The boundary between the States of Louisiana and Mississippi in the old channel was not changed by the avulsion and was fixed in the last channel, which was surveyed on the ground and shown on Louisiana Exhibit No. 36 (R. 1325) from the point shown on such exhibit as the head of the final thalweg of the old channel around the island to the north and west of the position of the

thalweg in that channel when it ceased to be a running stream sometime after the period 1878-80, as depicted on the Mississippi River Commission Chart published in 1883 (Exhibit Fisk Cross-Examination No. 4, R. 328)—Plate I of the brief.

6.

Defendant excepts to the finding of Fact No. 9 as to Diamond Island, and moves to substitute in lieu thereof the following, viz:

"9(a)

"That all of the accretions south of Diamond Island were formed and attached to that part of the Louisiana shore (Bedford Bar) upstream from the head of the final thalweg in the old channel (the point of division or beginning of boundary between the states fronting on the river); and that such accretions tailed down in front of, without being attached or connected to, the island, and belong to Louisiana.

"9(b)

"(In the alternative, and only in the event 9(a) is not adopted)

"In accordance with the legal principle concerning division of accretions urged by both the State of Mississippi and the State of Louisiana, the boundary between the two states in the Diamond Island-Diamond Island Towhead Area on the east should be fixed by beginning at the head of the final thalweg of the old channel around the island as surveyed on the ground and shown on Louisiana Exhibit No. 86 (R. 1325) and extending across the accretions at right angles to the successive thalweg positions of the river; all as shown on Plate 2 of La. Exhibit No. 43 (R. 1398); and on the west, should be

extended across the accretions beginning at Point C and along the line to Point $C_1$, Point $C_2$, and Point $C_3$, as shown on Smith Exhibit 5 (R. 679). The points and lines, according to the testimony, can be easily located on the available official government charts and upon the ground by survey."

7.

Defendant further excepts to the findings of fact not containing the following finding as to Diamond Island Towhead Area, and moves to amend the same by adding thereto the following finding of fact:

"11.

"That the southern boundary of Diamond Island Towhead is in the old Oak Bend Channel of the Mississippi River where it will remain so long as that channel remains a running stream, subject to be changed by erosion and accretion."

8.

Defendant excepts to the finding of Fact No. 1 as to Diamond Point, and moves to substitute in lieu thereof the following, viz:

"1.

"Based upon the admissions of the State of Louisiana and upon the evidence, Diamond Point is located in the State of Mississippi; that the northerly boundary thereof is in the old Oak Bend Channel of the Mississippi River where it will remain so long as that channel remains a running stream, subject to be changed by erosion and accretion; which old channel separates Diamond Island Towhead Area from Diamond Point Area from the east

at Diamond Cut to the west at Palmyra Lake; that the boundary in Newtown Bend is in the old channel to the north of the island lettered "A" on La. Exhibit No. 29 (R. 1101) where it remained until that channel ceased to be a running stream, which old channel is readily visible and can easily be surveyed on the ground today; that from Palmyra Lake on the west to the west end of the old channel to the north of said island lettered "A" on La. Exhibit No. 29 (R. 1101) when that channel ceased to be a running stream, the correct boundary in that area is as described by the State Boundary portion of the Special Master's Report."

**9.**

Defendant excepts to the finding of Fact No. 2 as to Diamond Point and moves to amend the same by adding thereto the following clause:

"except that neither the time elapsed nor any possession claimed is sufficient for the doctrine of prescription to apply to the island in Newtown Bend south of Diamond Point which sometime after 1932-3 became attached to Diamond Point, and which island is lettered A on La. Exhibit No. 29", (R. 1101).

**10.**

Defendant does not except to the conclusion of Law No. 5 as stated, but defendant does except to the Master disregarding such conclusion of law; which is, that where there is a boundary in an old channel around an island formed by an avulsive cut-off, that so long as that old channel remains a running stream, the boundary marked by it is still subject to be changed by erosion and accretion, and substituting therefor a conclusion of law directly in conflict, viz: that when there is a boundary in an old channel around an island formed

by an avulsive cut-off, that when that channel can no longer be used for navigation and/or no water can enter it at some low stages, then the boundary becomes fixed at such time, despite the fact that the channel is a running stream at other than such low stages and is subsequently changed by erosion and accretion.

11.

Defendant does not except to the conclusion of Law No. 3 as stated, but defendant does except to the Master's disregarding such conclusion of law, which is, that where the course of a boundary stream is changed through the operation of the natural and gradual process of erosion and accretion, the boundary follows the stream and remains the varying center of the channel; and substituting therefor a conclusion of law directly in conflict, viz: by use of a new theory developed by Mississippi's expert witnesses of "divided thalweg" or "point of divergence of thalwegs" freezing a boundary in a running stream for a distance of about a mile and a fraction upstream from the head of an island formed by an avulsive cut-off, despite the fact that this portion of the bed and channel of the river changed because there was a running stream therein, through the operation of the natural and gradual process of erosion and accretion.

Respectfully submitted,

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## CERTIFICATE

This is to certify that copies of the foregoing exceptions to the report of the Special Master have been served upon counsel of record of the State of Mississippi by mail, deposited in a United States mail box, with first class postage prepaid, addressed to counsel of record of the State of Mississippi at the post office address listed.

Baton Rouge, Louisiana, May 6, 1955.

JOHN L. MADDEN
Assistant Attorney General
State of Louisiana

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STATE OF LOUISIANA,

Defendant

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## Motion for Leave to File Brief and to Present Oral Argument

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Louisiana, by its Attorney General, respectfully moves the Court to grant leave to file a brief in support of its exceptions to the Report of the Special Master, and to have this matter set down for a hearing before the Court, at which time counsel for the State of Louisiana may have the opportunity of presenting oral argument.

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## CERTIFICATE

This is to certify that copies of the foregoing motion for leave to file brief and to present oral argument have been served upon counsel of record of the State of Mississippi by mail, deposited in a United States mail box, with first class postage prepaid, addressed to counsel of record of the State of Mississippi at the post office address listed.

Baton Rouge, Louisiana, May 6, 1955.

JOHN L. MADDEN
Assistant Attorney General
State of Louisiana